



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 27, 2003

Mr. Leonard V. Schneider  
Ross, Banks, May, Cron & Cavin, P.C.  
2 Riverway, Suite 700  
Houston, Texas 77056-1918

OR2003-6041

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186647.

The City of League City (the "city"), which you represent, received a request for any and all documents relating to the application, hiring or background investigation process for the position of Deputy Fire Marshal for the twelve month period preceding the request. The requestor also seeks any documents reflecting contracts, agreements or payments made to any third parties to conduct background investigations for the Fire Marshal position, and any correspondence regarding the background investigations. You have provided documentation showing that you have notified six individuals of their right to submit arguments to this office as to why certain information related to these individuals should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). As of the date of this decision, we have not received any correspondence from any of the individuals you notified. You state that you will release most of the responsive documents, a video tape, and two cassette tapes to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

---

<sup>1</sup>We note that in your brief to this office dated June 30, 2003, you inform us that the requestor modified his request to allow the city to either withhold or redact the following information that relates to job applicants: "Bills, credit history and financial account numbers of the applicants; Criminal History Information; Transcripts from high schools and colleges; Pictures of Police Officer; Birth Certificates; Police officer's social security numbers, home address, home telephone number, personal cellular phone number, personal pager number, and information that reveals whether the individual has family members; all Social Security Numbers; Personal e-mail addresses of applicants; and Texas Driver License numbers, VIN#'s, License Plate Numbers and Vehicle Title Numbers." Accordingly, you have withdrawn your assertions of sections 552.114, 552.115, 552.117, 552.119, 552.130, 552.136 and 552.137 of the Government Code.

Initially, we note that Exhibit D is subject to public disclosure under section 552.022 of the Government Code, which provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit D consists almost entirely of completed evaluations, which are subject to section 552.022(a)(1). Thus, the city may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Although you claim sections 552.103 and 552.111 for this information, these exceptions are discretionary and thus do not constitute other law for the purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the evaluations in Exhibit D under section 552.103 or 552.111 of the Government Code. As you claim no other exceptions for this information, and it is not otherwise confidential by law, you must release the evaluations to the requestor. We will therefore address your arguments for the remaining submitted information.

You argue that the remaining submitted information, comprising Exhibits B, C, one page from Exhibit D, E, and F, is excepted under section 552.103 of the Government Code. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the city anticipates litigation by one of the former job applicants and that the requested information relates to that anticipated litigation. You have submitted information to this office showing that the job applicant has filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and indicate that the complaint was pending when the city received this request. Based on the information you have provided, we conclude that you have shown that the city reasonably anticipated litigation at the time it received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103 to the remaining requested information and may withhold the remaining submitted information, including Exhibits B, C, the page in Exhibit D which we have marked, E, and F under that exception.

In reaching this conclusion, we assume that none of the information at issue has previously been made available to the potential opposing party in the anticipated litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982). As our ruling is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 186647

Enc. Submitted documents

c: Mr. Gregory B. Cagle  
Region III Attorney  
Texas Municipal Police Association  
215 East Galveston Street  
League City, Texas 77573  
(w/o enclosures)